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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 80-5618

GEORGE MARISCAL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE MARISCAL
Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

GEORGE MARISCAL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, George Mariscal, pursuant to Rule 46, Supreme Court Rules, and Title 18, United States Code, §3006A (d) (6), respectfully moves this Honorable Court for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent the petitioner on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 27th day of October, 1980.

STEWART & McLEAN, LTD.

By: _____

WILLIAM H. McLEAN
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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

GEORGE MARISCAL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, George Mariscal, requests that a Writ of Certiorari issue to review the judgment and memorandum decision of the United States Court of Appeals for the Ninth Circuit, No. 79-1564, entered on July 24, 1980, affirming the petitioner's conviction and sentence in the United States District Court for the District of Arizona, Phoenix, Arizona.

OPINIONS BELOW

A copy of the memorandum of decision of the United States Court of Appeals for the Ninth Circuit affirming petitioner's conviction is attached and appears in the Appendix.

JURISDICTION

This Court's jurisdiction to review the decision of the Ninth Circuit is invoked under Title 18, United States Code, §1254(1) and Rule 17 (1) (c) of the Supreme Court Rules.

QUESTIONS PRESENTED

I

WHETHER THE MAIL FRAUD PROVISIONS OF TITLE 18, UNITED STATES CODE, § 1341, APPLY WHERE THE ONLY "MAILING" ALLEGED IN THE INDICTMENT, OR PROVED AT TRIAL, WAS THE ROUTINE ROUTING OF NEGOTIATED CHECKS THROUGH THE FEDERAL RESERVE SYSTEM, BY MAIL, DONE IN ORDER TO ADJUST ACCOUNTS BETWEEN THE PAYEE AND DRAWEE BANKS?

II

SHOULD THE JUDICIALLY CREATED "CONCURRENT SENTENCE DOCTRINE" BE INVOKED BY AN APPELLATE COURT TO AVOID DECIDING A "COMPLEX" ISSUE OF FIRST IMPRESSION WHERE THERE IS A STRONG LIKELIHOOD THAT ITS APPLICATION WILL EXPOSE THE PETITIONER TO THE RISK OF ADVERSE CONSEQUENCES CAUSED BY INVALID BUT UNREVERSED CONVICTIONS?

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 1341, provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five (5) years, or both."

STATEMENT OF THE CASE

On March 9, 1978, a federal grand jury sitting in the District of Arizona (Phoenix) indicted petitioner, George Mariscal (hereinafter referred to as "petitioner" or "Mariscal") charging him with thirteen counts of mail fraud in violation of Title 18,

United States Code, § 1341, and ten counts of interstate transportation of property obtained by fraud, in violation of Title 18, United States Code, § 2314. In its ten-page preamble, the indictment alleged a rather complex scheme or artifice beginning about May 2, 1972, and continuing until about December 31, 1975.

The indictment alleged that in 1973, Mariscal, as the lawyer for a hydroponic farming operation known as Toltec Agronomics, had approached the Industrial Development Board for the City of Las Cruces and Donna Ana County, New Mexico, about the availability of an industrial revenue bond program to finance a greenhouse /farming complex. (Government Exhibit No. 55; RT A. 75)[1]. By December, 1973, the Industrial Board had recommended, and the Las Cruces, New Mexico, City Council had approved a $1.2 million industrial bond issue to build the proposed greenhouse complex. (RT E. 226). Security Trust Company of Albuquerque, New Mexico, was designated by the parties as trustee for the bond funds. On December 15, 1973, the bond instruments were signed and approximately $731,000.00 was paid to Security Trust as trustee and designated by them as "construction funds". (RT A. 212). Over the next eleven months requisitions for construction payments were presented to Security Trust by Mariscal, all of which they paid, completely exhausting these funds. The indictment alleged that the scheme or artifice to defraud was in connection with the presentment of false or fraudulent requisitions.

Upon receiving construction payment checks from Security Trust, Mariscal would transport them to Arizona and deposit them in a bank account at the First National Bank of Arizona in Phoenix, Arizona. (RT C.18). An employee of First National Bank testified that when Mariscal deposited these checks he received immediate credit in the account. After crediting the account, the bank returned the negotiated checks by mail to the drawee bank in Albuquerque through the Federal Reserve System. It was this series of mailings that constituted the first ten even numbered mail fraud counts of the indictment. The mailing of the checks back to Albuquerque was merely a routine and incidental banking function to adjust the accounts between the payee and the drawee

---

1/ With the exception of the proceedings held July 23, 1979, the reporter's transcript of the proceedings in this action have been labeled Volumes "A" through "H", and the page numbers prefixed by the volume letter. Thus, the designation of record "RT A.75", as used in this petition, denotes "Reporter's Transcript, Volume A, page 75." For brevity and clarity, this simplified designation will be used throughout this petition.

banks. (RT C. 18; RT C. 20). Further, the bank employee testified that the procedure used to process these checks was identical to the procedure used by the bank for processing credit card deposits. (RT E. 8).

Mariscal's Motion for Judgment of Acquittal as to the mail fraud counts made at the close of the government's case, and at the close of all of the evidence, was denied. Twelve of the mail fraud counts were submitted to the jury for its consideration, and after six days of deliberation, the jury convicted him on all counts. (Count 23 of the indictment, alleging mail fraud, had been dismissed by the government previously).

On July 31, 1979, the petitioner was sentenced to the custody of the Attorney General for a period of three years on each count, with the sentences to run concurrent. He was released on his own recognizance pending appeal to the Ninth Circuit Court of Appeals and remains on this release status pending this petition to this Honorable Court.

On July 24, 1980, the United States Court of Appeals for the Ninth Circuit, in a memorandum decision, affirmed the convictions, but declined to review the twelve mail fraud convictions solely because of the "concurrent sentence doctrine." A timely motion for rehearing and suggestion of rehearing en banc was denied on September 29, 1980. A Motion for Stay of Mandate has been filed with the Circuit Court pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

BY ITS APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE THE NINTH CIRCUIT COURT OF APPEALS IMPROPERLY REFUSED TO REVIEW THE PETITIONER'S CONVICTIONS FOR MAIL FRAUD WHERE, IN A CASE OF FIRST IMPRESSION:

A. THE GOVERNMENT FAILED TO ALLEGE OR PROVE A "MAILING" THAT WAS SUFFICIENTLY RELATED TO THE ALLEGED SCHEME OR ARTIFICE TO BRING THE PETITIONER'S CONDUCT WITHIN THE MEANING OF TITLE 18, UNITED STATES CODE § 1341; AND

B. WHERE THE UNRESTRICTED USE OF THE CONCURRENT SENTENCE DOCTRINE CREATES A SUBSTANTIAL LIKELIHOOD THAT ITS APPLICATION WILL EXPOSE THE PETITIONER TO A RISK OF ADVERSE CONSEQUENCES CAUSED BY AN INVALID BUT UNREVERSED CONVICTION.

Title 18, United States Code, §1341, makes it illegal to cause the mails to be used for the purpose of "executing" a scheme or artifice to defraud. In United States v. Maze,

414 U.S. 395 (1974), the most recent decision of this Court to discuss the mailing aspect of this section, the Court stated:

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice'***." 414 U.S. at 404 (emphasis supplied).

In Maze, the defendant had been convicted of mail fraud arising out of his unauthorized use of another's bank credit card at several out-of-state motels. The "mailings" alleged in the indictment consisted of the routine routing of the credit card invoices through the mails from the various motels back to the issuing bank and eventually by the bank to the card owner. The Sixth Circuit Court of Appeals and this Court assumed that the evidence adduced at trial supported a finding that the defendant "caused" the mailings. However, as the Court noted, the more difficult question was:

> "***Whether these mailings were sufficiently closely related to the respondent's scheme to bring his conduct within the statute." 414 U.S. at 399.

The Court held that these mailings were not sufficiently related to Maze's scheme to invoke §1341, and affirmed the Circuit Court's reversal of the conviction. In so holding, the Court analyzed its previous cases dealing with this issue as follows:

> "In Kann [v. United States, 323 U.S. 88 (1944)] corporate officers and directors were accused of having set up a dummy corporation through which to divert profits of their own corporation to their own use. As part of the scheme, the defendants were accused of having voluntarily obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. This Court held that the fraud was completed at the point at which the defendants cashed the checks.
>
> > 'The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statute requires.'
>
> "In Parr [v. United States, 363 U.S. 370 (1960)], the defendants were charged inter alia, with having obtained gasoline and other products and other services for their own purposes by the unauthorized use of a gasoline credit card issued to the school district which employed them. The oil company which furnished the products and services to the defendant would mail invoices to the school district for payment, and the school district's payments were made by a check sent in the mail. Relying on Kann, the Court again found that there was not a sufficient connection between the mailing and the execution of the defendant's scheme

because it was immaterial to the defendant how the oil company went about collecting its payment.

"The defendant in Pereira [v. United States, 347 U.S. 1 (1954)], was charged with having defrauded a widow of her property after marrying her. The Court described the conduct of the defendant in these words:

> 'Pereira asked his then wife if she would join him in the hotel venture and advance $35,000.00 towards the purchase price of $78,000.00. She agreed. It was then agreed between her and Pereira that she would sell some securities that she possessed in Los Angeles and bank the money in a bank of his choosing in El Paso. On June 15, she received the check for $35,000.00 on the Citizens National Bank of Los Angeles from her brokers in Los Angeles and gave it to Pereira, who endorsed it for collection to the State National Bank of El Paso. The check cleared, and on June 18, a cashier's check for $35,000.00 was drawn in favor of Pereira.'

"Thus the mailings in Pereira, played a significant part in enabling the defendant in that case to acquire dominion over the $35,000.00 with which he ultimately absconded. Unlike the mailings in Pereira, the mailings here [in Maze] were directed to the end of adjusting accounts between the motel operator, the Louisville Bank, and Meredith, all of whom had to a greater or lesser extent been the victims of respondent's scheme. Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." 414 U.S. at 400-402 (footnotes omitted) (emphasis supplied).

To date, counsel has been unable to locate any reported decision wherein a routine mailing of negotiated checks through the Federal Reserve System has been used by the government as the basis for a mail fraud prosecution. We believe that this conviction is the first of its kind in the United States, and that solely because of the Circuit Court's application of the judicially created concurrent sentence doctrine the petitioner has been denied an appellate review of his conviction as to these counts.

Although the Court of Appeals characterized the issue we raise by this petition as "complex", we believe that its resolution is found in a close analysis of this Court's decisions in Kann, supra, Parr, supra, Pereira, supra, and Maze, supra. We believe that an application of the Kann-Maze holdings to the instant case results in the obvious conclusion that the government simply failed to allege or prove "mailings" that fall within the scope of the mail fraud statute. The scheme or artifice that was alleged in this case reached fruition upon delivery of the Security Trust checks to Mariscal or most certainly upon their deposit and immediate receipt of credit at the First National Bank in

Phoenix. The success of petitioner's scheme was in no way dependent upon or affected by the subsequent routine mailing of these checks through the Federal Reserve System from Phoenix back to Albuquerque. To use the words of this Court in Maze, supra, there simply is "no indication that success of his scheme depended in any way on which of his victims ultimately bore the loss," or how the checks were returned to the drawee bank in New Mexico.

We also believe that this Court should review this case because the court below refused to consider the mail fraud issue solely because of the archaic concurrent sentence doctrine.

The concurrent sentence doctrine, as approved by this Court in Hirabayashi v. United States, 320 U.S. 81 (1943), holds that where concurrent sentences are imposed upon conviction of more than one count of an indictment, and the conviction as to any single count can be affirmed, review of the remaining counts is unnecessary. Although the application of this judicially created rule has been approved by this Court, its use by many circuit courts has been held to be inappropriate except in limited circumstances. However, the Ninth Circuit Court of Appeals has not, as of this date, limited or restricted its use.

In United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972), the Circuit Court thoroughly analyzed the concurrent sentence doctrine and concluded as follows:

> "Tanner and Pearl, who were charged under Count IV, joined in Rice and Chipman's attack on this count. (Footnote omitted). In addition, Pearl alleges that his conviction under Count I of the indictment is barred by the Fifth Amendment prohibition against double jeopardy. Neither of these appellants, however, has directed any specific attack against the validity of the remaining count of the indictment, Count VII (Footnote omitted).
>
> "Until recently, the validity of Count VII would have rendered unnecessary further inquiry into the validity of Count IV where Tanner is concerned and Counts I and IV where Pearl is concerned. Appellate review would here be avoided since Tanner's and Pearl's sentences under Count VII are concurrent with the sentences assessed under all other counts of the indictment. Lawn v. United States, 355 U.S. 339, 359 (1957); Hirabayashi v. United States, 320 U.S. 81, 85 (1942). The Supreme Court's decision in Benton v. Maryland, 395 U.S. 784, 791 (1969), constitutes a re-evaluation of the 'concurrent sentence doctrine.' Benton holds that there is no jurisdictional bar (stemming from the requirement of justiciability) to a consideration of all counts under concurrent sentences. The Court points out that an unreviewed count could increase an appellant's future sentencing under an habitual offenders statute, or adversely affect his chances for parole, or be used to impeach

his testimony at a future trial. Benton suggests that review is desirable where adverse collateral consequences of this nature may flow from conviction. See, Davie v. United States, 447 F.2d 480 (7th Cir. 1971); United States v. Febre, 425 F.2d 107 (2nd Cir. 1970), cert. denied, 400 U.S. 849 (1971). Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." 471 F.2d at 140.

More recently, in United States v. Holder, 560 F.2d 953 (8th Cir. 1977), the court reviewed, in an extremely thorough analysis, the continued viability of the concurrent sentence doctrine. In rejecting the application of this rule in most cases, that Court reasoned:

> "Whether the [concurrent sentence] rule should be applied in a particular situation is a matter of judicial discretion, Sanders v. United States, 541 F.2d 190, 193 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977), but, in our judgment, it ought not to be invoked where there is a likelihood that its application may expose a defendant to the risk of adverse consequences caused by an invalid but unreversed conviction. See, United States v. Lindsay, 552 F.2d 263 (8th Cir. 1977); United States v. Neff, 525 F.2d 361 (8th Cir. 1975) (J. Lay concurring); United States v. Belt, 516 F.2d 873 (8th Cir. 1975), cert. denied 423 U.S. 1056 (1976). See also Benton v. Maryland, 395 U.S. 784 (1969); United States v. Tanner, 471 F.2d 128, 140 (7th Cir.), cert. denied 409 U.S. 949 (1972); United States v. Febre, supra, at 113." 560 F.2d at 956.

Thereafter, the Eighth Circuit Court of Appeals analyzed the effect that the unreversed but otherwise invalid convictions might have upon the appellant in several areas. First, the unreversed conviction may well have an adverse effect on the prisoner's "offense severity rating" and his "salient factors score", as these factors are used by the United States Board of Parole in computing a prisoner's time range for parole eligibility. Not only may the unreversed, but invalid convictions affect Mariscal's parole eligibility in the instant case, but also such additional convictions may adversely affect parole computation in the future. Also, as suggested by the court in Holder, supra, there may clearly be an effect on the individual in the future by the application of a recidivist statute or, in attempting to impeach him with what would otherwise be an invalid "fraud" conviction.

We believe that most, if not all, of these arguments apply in Mariscal's case and weigh heavily against the Circuit Court's decision to sidestep the "complex" task of resolving more than half of the counts of the indictment that Mariscal has been convicted of. Most certainly, Mariscal's "salient factor score" will be affected by the unreviewed affirmance of the mail fraud violations. As we understand it, the United States Bureau of Prisons computes the "dollar value" of fraud related crimes based upon

the allegations contained in the indictment on those counts that the petitioner was convicted of. In the instant case, if the dollar value of the mail fraud counts are included within this computation, either Mariscal's "salient factor score" or his "offense severity rating" will be increased. He will unquestionably fall into a category rated as either "high" or "very high" unless these counts are also reviewed and reversed, as we believe they should.

Additionally, we point out to this Honorable Court that until being convicted in this case, the petitioner was a respected lawyer in his community in Arizona. It has been both shame and punishment to him to be charged, much less convicted. He has claimed throughout this case that he totally lacked the intent to defraud anyone. He has also claimed throughout this case that the mail fraud charges against him were both untrue and invalid. He should not now be denied a review of these counts because of an archaic, discretionary doctrine.

As the Court held in Holder, supra:

> "For many years, we have applied the concurrent sentence rule in the interests of judicial economy with the reservation that it not be followed where it might expose the defendant to substantial risk of adverse consequences. Sanders v. United States, supra at 193; United States v. Belt, supra at 875-876. Until recently, we lacked evidence that applying the concurrent sentence rule would influence parole status decisions. It now appears that the United States Board of Parole's regulations for determining parole eligibility necessitate a reassessment of this doctrine. (Footnote omitted). Because we have identified the possibility of adverse consequences, we will consider the validity of Holder's evidentiary claim." 560 F.2d at 956.

It appears that there is a definite groundswell from some circuit courts throughout the nation challenging the continued viability of routinely applying the concurrent sentence doctrine. Among others, the following cases support our position that it should not be followed in this case: United States v. Rubin, 559 F.2d 975, modified, 572 F.2d 320 (5th Cir. 1978); Vacated and remanded, _____ U.S. _____, 99 S. Ct. 67 (1978) (mem.); Opinion after remand, (aff'g. in part, rev'g. in part), 591 F.2d 278 (5th Cir. 1979); United States v. Fleming, 504 F.2d 1045 (7th Cir. 1945); United States v. McLeod, 493 F.2d 1186 (7th Cir. 1974).

In virtually every case found by the petitioner in which an appellate court rejected the applicability of the concurrent sentence doctrine, its use had been advocated by the government. In the instant case, the government did not rely upon this doctrine in its brief filed with the Circuit Court. Neither did the government urge its application at

oral argument. The Circuit Court received virtually no guidance in applying this harsh doctrine in this case. It seems especially unfair that this doctrine should now be invoked, without the benefit of either written or oral argument, to deny the petitioner a consideration of the substantial questions he raises concerning the validity of more than half of the counts of the indictment upon which he has been convicted.

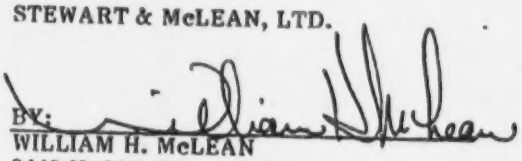
Based upon the above, we believe that although the issues raised by these mail fraud convictions are "complex", that they must be decided. The Circuit Court's unpublished opinion should be reviewed by this Court in order to: (1) determine, in a case of first impression, the applicability of the mail fraud statute to the routine mailing of negotiated checks between banks to adjust their accounts; and (2) to determine the continued viability of the judicially created concurrent sentence doctrine in a case where its application will expose the petitioner to the risk of adverse consequences caused by an invalid but unreversed conviction.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 27th day of October, 1980.

STEWART & McLEAN, LTD.



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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

GEORGE MARISCAL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

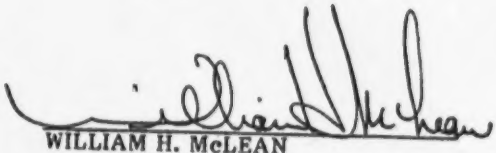
STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

AFFIDAVIT OF SERVICE

WILLIAM H. McLEAN, being first duly sworn, deposes and says:

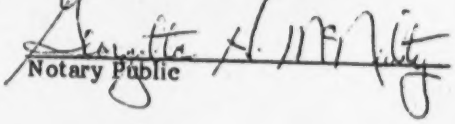
That in accordance with Rule 28, Supreme Court Rules, he has served a copy of the following documents on the respondent, United States, by depositing them in a United States post office or mail box, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 27th day of October, 1980:

1. Motion for Leave to Proceed in Forma Pauperis;
2. Petition for Writ of Certiorari to the United States court of Appeals for the Ninth Circuit;
3. Affidavit of Service.



WILLIAM H. McLEAN

Subscribed and sworn to before me this 27th day of October, 1980 by William H. McLean.



Notary Public

My Commission Expires:

4-25-81

APPENDIX

FILED

JUL 24 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

GEORGE MARISCAL,

Appellant,

No. 79-1564

D.C. No. CR 78-80 PHX

MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
William E. Copple, District Judge, Presiding
Argued and submitted May 14, 1980

Before: GOODWIN, ALARCON and NELSON, Circuit Judges.

George Mariscal appeals his conviction on twenty-two counts arising out of fraudulent promotion of a greenhouse project financed by municipal bonds. The ten odd-numbered counts of the indictment charge Mariscal with devising a scheme to defraud bond purchasers by causing checks to be issued upon false requisitions and then transporting the checks in interstate commerce between Albuquerque, New Mexico, and Phoenix, Arizona, in violation of 18 U.S.C. § 2314. The twelve even-numbered counts charge Mariscal with causing checks issued from the Security Trust Company account to be sent through the United States Postal Service in violation of 18 U.S.C. § 1341. A twenty-third count was dismissed at trial.

Mariscal raises six issues on appeal. Our disposition of four of the issues makes it unnecessary to consider the remaining issues relating to twelve mail fraud counts.

In 1972, Mariscal, an Arizona attorney, represented two corporations, Franchise Funding, which traded its stock over the counter, and Toltec Hydroponics, which needed capital to commence a greenhouse farming operation. In April 1972, on the advice of Mariscal, the two corporations merged and became Toltec-Agronomics.

After several unsuccessful attempts to raise capital for the greenhouse project, Mariscal induced the Las Cruces, New Mexico, Industrial Development Board to agree to a municipal bond issue to finance the project. Mariscal represented to the Board that Toltec would build a 4.4-acre greenhouse at a cost of $2.5 million. He further represented that two hydroponic experts named Taylor and Becker would serve as consultants and that Toltec owned land in Colorado which, although the object of litigation, would be available to Toltec for future use.

Before the Board authorized the bond sale, Toltec lost title to the Colorado property and Taylor and Becker ceased to serve as consultants, becoming titular figures in the corporation. Mariscal did not inform the Board of these facts.

The bond closing took place in December 1973. The Board had recommended that the City of Las Cruces authorize a $1.2 million bond sale to build a 4.4-acre greenhouse. In April 1974, Mariscal signed a contract with a construction company to build a 2.2-acre greenhouse. He did not inform the city or the Board of the reduced size of the project until September 1974.

The bond proceeds were held by Security Trust Company with disbursements to be made for the costs of construction when due and payable. Between January 1974 and sometime in

1975, Mariscal requisitioned $752,000 for construction funds which were deposited in an account in Phoenix held by "Toltec Properties." These checks were routed through the Federal Reserve System for collection. Of the $752,000, Mariscal wrote checks to himself and his wife for personal use, amounting to $110,100. In late 1974, Mariscal made contributions from personal funds to the nearly depleted construction funds. These contributions ultimately amounted to between $32,000 and $100,000.

In the spring of 1976, Security Trust Company filed a foreclosure against Toltec. By December 1977, the construction funds were exhausted. In March 1978, Mariscal was indicted on thirteen counts of mail fraud and ten counts of interstate transportation of property obtained by fraud.

Our review on appeal will be limited to the following issues:

A. Was the evidence of intent to defraud sufficient to convict?

B. Was the admission of evidence that Mariscal signed the names of others on corporate documents without their authorization reversible error?

C. Did the trial court err in refusing to preclude the government from impeaching Mariscal's character witnesses with his prior securities and fraud offenses?

D. Is it necessary, under the concurrent sentence doctrine, to review Mariscal's conviction on twelve counts of violation of 18 U.S.C. § 1341?

A. Intent to Defraud.

Viewing the evidence in the light most favorable to the government, as we must, Glasser v. United States, 315 U.S. 60, 80 (1942), we find that evidence presented at trial supported the jury's finding that Mariscal had the requisite intent to defraud, when he induced the City of Las Cruces to fund the greenhouse project with a bond issue. The

government introduced evidence that Mariscal misrepresented to the City of Las Cruces: (1) the extent to which two experts in hydroponic agriculture participated in the greenhouse project; (2) the size of the facility to be built with the proceeds of the bond issue; and (3) the extent of Toltec's assets. The government also presented evidence that Mariscal misrepresented the costs of the greenhouse construction in requisitions he submitted to Security Trust Company. Finally, although there was conflicting evidence concerning the amount Mariscal purportedly "borrowed" from the bond proceeds, he concedes that he owed over $6,000 to the construction fund at the time of trial.

When viewed in the light most favorable to the government, the evidence of deliberate or reckless misrepresentations is substantial. The jury could have inferred an intent to defraud, despite Mariscal's claim that he acted in good faith, and despite his production of conflicting evidence.

B. Evidence of "Forged" Signatures.

Mariscal argues that the court erred in permitting a handwriting expert to testify that Mariscal had signed the names of two purported Toltec corporation officials on documents filed with the Arizona Corporation Commission. However, defense counsel did not object to this testimony at trial. In the absence of an objection Mariscal must show that the admission of the expert testimony constitutes "plain error." Fed. R. Cr. P. 52(b); United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978). There was no error, much less plain error.

The evidence of forged signatures was relevant to show that Mariscal's false statements to city officials were

not inadvertent, but were part of a larger plan or scheme to misrepresent the degree of his control of Toltec.

We also reject Mariscal's argument that the evidence was more prejudicial than probative. It was not likely that evidence of the alleged act of forgery would substantially affect the jury's evaluation of the mass of other damaging evidence introduced at trial.

C. Character Evidence.

Mariscal contends that the district court erred in denying his motion in limine through which he sought to preclude the government from cross-examining his intended character witnesses. The government planned to inquire about a 1971 S.E.C. cease and desist order entered against Mariscal for the unlawful sale of securities and about Mariscal's 1972 plea of nolo contendere to a misdemeanor charge of maintaining fraudulent corporate records. The court recognized that specific instances of past conduct by a defendant are admissible to impeach the testimony of a character witness called by a defendant. Fed. R. Evid. 405. Relevant instances of past conduct may be excluded, however, if their probative value is outweighed by their prejudicial effect on the jury. Fed. R. Evid. 403.

Mariscal argues unpersuasively that the two prior offenses are not relevant to his reputation for honesty and integrity. This is nonsense. Both involve instances of deliberate misrepresentation. Moreover, neither is sufficiently remote in time to distort Mariscal's current reputation. These past events are particularly useful for testing the quality of the "character" evidence.

Mariscal further argues that his plea of nolo contendere is not relevant because it was not a "conviction"

under California law. Rule 405, however, sensibly does not limit admissible instances of conduct to those resulting in conviction. A plea of nolo contendere is relevant to a defendant's reputation and is therefore admissible under the rule. Kilgore v. United States, 467 F.2d 2227 (5th Cir. 1972).

Mariscal argues that evidence of these prior offenses was more prejudicial than probative and therefore inadmissible. His prior offenses are plainly probative. They are also prejudicial, but the prejudice is of his own making. Both are closely related to the crimes for which Mariscal was on trial. Decisions by the trial court to admit this kind of evidence are subject to reversal only for an abuse of discretion. See, e.g., United States v. Herrel, 588 F.2d 711, 714 (9th Cir. 1978), cert. denied, 440 U.S. 964 (1979). The trial court's ruling was not an abuse of discretion.

Mariscal further argues that the court erroneously denied him a hearing on the relevance of the prior offenses and, after denying the motion, refused to give cautionary instructions to each witness. These contentions are without merit. The record indicates that the trial court gave Mariscal an opportunity to make further argument in support of his motion. Nor was there any dispute concerning the factual bases of the incidents which might have justified an evidentiary hearing. Finally, the court indicated that it would consider a cautionary instruction if Mariscal submitted one, but defense counsel failed to do so.

D. Concurrent Sentence.

We do not reach Mariscal's contentions that there was insufficient evidence to support conviction on the even-numbered mail fraud counts. Mariscal received a

concurrent sentence on all counts, the ten transportation and the twelve mail fraud violations. Because we affirm the counts arising out of 18 U.S.C. § 2314, we need not reach the rather complex issues presented by Mariscal's challenge to the mail fraud convictions. United States v. Costey, 554 F.2d 909, 910 (9th Cir.), cert. denied, 431 U.S. 968, reh. denied, 434 U.S. 882 (1977). See Hirabayashi v. United States, 320 U .S. 81, 85 (1943).

Affirmed.

APPENDIX

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No. 80-5618

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

GEORGE MARISCAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the mailings on which his mail fraud convictions were premised were insufficient to make out a violation of the mail fraud statute, 18 U.S.C. 1341, and that the court of appeals misapplied the concurrent sentence doctrine in affirming his conviction.

1. Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on 10 counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314, and on 12 counts of mail fraud, in violation of 18 U.S.C. 1341 (Pet. App. 1). He was sentenced to concurrent three-year terms of imprisonment on each count (Pet. 8). The court of appeals affirmed, relying on the concurrent sentence doctrine in declining to review petitioner's convictions on the 12 mail fraud counts (Pet. App. 1-7).

The facts of the case are summarized in the opinion of the court of appeals (Pet. App. 2-3). In brief, the facts are as follows: petitioner induced the City of Las Cruces, New Mexico, and the Las Cruces Industrial Development Board to authorize a $1.2 million bond sale to build a 4.4 acre greenhouse. The bond proceeds were held by the Security Trust Company and disbursed to

petitioner in 1974 and 1975. During that period he requisitioned and obtained $752,000 of the bond proceeds for construction, although in fact he diverted a substantial portion of that sum to his own use. Before the construction was completed, Security Trust Company foreclosed against petitioner's corporation and the construction funds were thereafter wholly exhausted.

The evidence further showed that petitioner had made various misrepresentations to the City of Las Cruces in the course of obtaining the city's authorization for the bond sale: he had overstated the extent to which two experts had approved his greenhouse project; he had grossly overstated the size of the facility to be built with the proceeds of the bond issue; and he had overstated the amount of his corporation's assets (Pet. App. 4). The jury found that petitioner's various misrepresentations established his intent to defraud, and the court of appeals upheld that finding (ibid.).

2. Petitioner contends (Pet. 11-14) that the court of appeals should not have applied the concurrent sentence doctrine in declining to review his convictions on the 12 counts of mail fraud. While apparently conceding that the concurrent sentence doctrine is applicable in some cases, petitioner argues that it should not have been applied in this case because the mail fraud convictions could expose petitioner to some additional adverse consequences, beyond those that would flow from his convictions on the 10 counts of violating 18 U.S.C. 2314.

We disagree. This is a classic case for applying the concurrent sentence doctrine. Petitioner's convictions for interstate transportation of property obtained by fraud refer to precisely the same fraudulent course of conduct that was the subject of the mail fraud counts. As the court of appeals observed, petitioner's fraudulent conduct led the City of Las Cruces to authorize the bond sale and to disburse $752,000 in construction funds to petitioner. That fraudulent course of

conduct was the subject of both the 10 transportation counts and the 12 mail fraud counts. Because the jury had to find that the property transported under the transportation counts had been obtained by fraud, the jury necessarily found petitioner's course of conduct to be fraudulent for the purposes of both sets of convictions. Thus, petitioner's parole status will be the same regardless of whether the mail fraud counts are taken into account.

Under the Parole Commission guidelines, 28 C.F.R. 2.20, property offenses such as fraud and interstate transportation of property obtained by fraud are treated similarly. The severity rating for such offenses is measured by the amount of money involved in the offense. Thus a property offense involving less than $20,000 can be classified as an offense of "low," "low moderate," or "moderate" severity; a property offense involving betweeen $20,000 and $100,000 is a "high" severity offense; a property offense involving between $100,000 and $500,000 is a "very high" severity offense; and a property offense involving more than $500,000 is considered one of "greatest" severity. In determining the severity of an offense, the Parole Commission is not limited to consideration of only those counts on which the prisoner has been convicted; rather, it may take into account information from a variety of sources concerning the nature of the prisoner's criminal conduct. See, e.g., United States ex rel. Goldberg v. Warden, 622 F.2d 60 (3d Cir. 1980), cert. denied, No. 80-66 (Oct. 6, 1980).

Thus, contrary to petitioner's contention (Pet. 12), the mail fraud counts will have no effect on his "severity rating." Nor will the mail fraud counts in any way affect his "salient factor score," which is calculated mainly on the basis of personal history and background factors, not on the circumstances of the offense in question. See 28 C.F.R. 2.20. And finally, while petitioner makes a general claim that he may be affected by

the mail fraud counts in some future prosecution, he does not specify how he might be independently prejudiced in any future proceeding by the presence of his mail fraud convictions, in light of the existence of his valid convictions for transportation of property obtained by fraud. In sum, this case represents a perfectly unobjectionable application of the concurrent sentence doctrine, a doctrine that has been approved by this Court. United States v. Barnes, 412 U.S. 837, 848 (1973); Andresen v. Maryland, 427 U.S. 463, 469 n.4 (1976).[1/]

2. Petitioner further contends (Pet. 8-11) that the mailings in this case were not sufficient to establish a violation of the mail fraud statute, 18 U.S.C. 1341. Of course, if we are correct that the concurrent sentence doctrine was properly invoked in this case, it is unnecessary for this Court to consider the validity of the mail fraud convictions. However, if the Court believes it necessary to reach the merits of the mail fraud convictions, it is our conclusion that, under the authority of Kann v. United States, 323 U.S. 88 (1944), the mail fraud convictions would have to be reversed.

The facts relating to the unlawful mailings in this case are as follows: when petitioner requested the release of the bond funds, the Security Trust Company, in Albequerque, New Mexico, would issue a check to petitioner, which petitioner would transport to Arizona and deposit in a Phoenix bank. The Phoenix bank would then return the check by mail to the drawee bank in Albuquerque. The mailings from Phoenix to Albuquerque were the mailings that formed the basis for the mail fraud counts.

1/ The cases on which petitioner relies (Pet. 11-12), United States v. Holder, 560 F.2d 953 (8th Cir. 1977), and United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972), are not helpful to him. Those cases merely stand for the proposition that the concurrent sentence doctrine should not be applied where the defendant could suffer added collateral consequences from the unreviewed convictions. We agree with that rule, of course, but we disagree that there are any such adverse consequences facing petitioner in this case.

sufficiently related to the fraudulent scheme to bring his conduct within the reach of the mail fraud statute.

We believe that petitioner's point is well taken. In Kann v. United States, supra, the defendants fraudulently obtained checks payable to them, which they cashed or deposited at a bank. The checks were then mailed for collection to the drawee bank. This Court held that the fraud was completed at the point at which the defendants cashed the checks. The Court wrote (323 U.S. at 94; footnote omitted):

> The scheme * * * had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.

See also Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974).

As in Kann, petitioner had obtained the fruits of his fraud by the time he deposited the Security Trust Company checks in his Phoenix bank. Of course it was important to the continued success of the scheme that each check be collected when the Phoenix bank sent it to the Albuquerque bank for collection. But, as we read the Kann case, a continuing interest in seeing that the drawee bank pay the payor bank each time a fraudulently obtained check is presented is not a sufficient interest to bring the inter-bank mailings within the reach of the mail fraud statute.

Because the court of appeals properly applied the concurrent sentence doctrine in this case, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

DECEMBER 1980